

BACKGROUND PAPER FOR HEARING RESPIRATORY CARE BOARD OF CALIFORNIA

IDENTIFIED ISSUES, QUESTIONS FOR THE BOARD, AND BACKGROUND CONCERNING ISSUES

PRIOR SUNSET REVIEW AND SUBSEQUENT REMEDIAL ACTIONS: The Respiratory Care Board (“Board”) was last reviewed by the Joint Legislative Sunset Review Committee (“Committee”) in 1998. The Department of Consumer Affairs (“Department”) and the Committee identified a number of issues and problem areas relating to the Board. The major issues included:

- Whether the composition of the Board should be changed;
- Whether the Board’s “major fiscal problems” warranted a fee increase after curtailing expenses, non-mandatory services and programs;
- Whether the Board was too aggressive in its enforcement, revoking licensees for offenses that had little relationship to practice; and
- Whether there should be mandatory reporting of employer action against respiratory care practitioners (“RCPs”).

Despite these significant problem areas, the Committee suggested that the Board endure, but the Committee and the Department also issued several recommendations. Many of these major recommendations and issues have, in whole or in part, been addressed by legislation. SB 1980 (Greene), enacted in 1998, (i) changed the composition of the Board from two physicians and surgeons, four RCPs and three public members to one physician and surgeon, four RCPs, and four public members (an increase of one public member at the expense of one physician/surgeon member); (ii) raised renewal fees for the Board from \$200 to \$230 (although the fee increase has not yet been imposed per that 1998 law due to adequate reserves and cost-cutting); and (iii) required a six month estimated reserve.

Where these statutes do attempt to address these issues, they closely track the Department’s and Committee’s prior recommendations. However, the Department did recommend that the appointment responsibility for appointees to the Board be changed so that the Governor would make all appointments except for two. This recommendation was not adopted by the JLSRC and was not a part of SB 1980. Hence, the appointing authorities and their number of appointees is the same since the last review: three Assembly appointees, three Senate appointees, and three gubernatorial appointees. (Observe: As of this date, the Board’s three gubernatorial appointments remain empty.)

AB 123 (Wildman), also enacted in 1998, in response to the so-called “angel of death” case, requires mandatory reporting when (for example) a RCP is terminated by an employer for cause. This far-reaching statute – credited by the Board for vastly increasing their ability to act quickly to protect the public – closely mirrors the Committee’s and Department’s suggestions.

The remaining major issue from the last review not addressed by legislation is the question of whether the Board remains too aggressive in its disciplinary enforcement – imposing punishments that, in essence, are disproportional to the offense. Both the Department and the Committee recommended that the Board prioritize enforcement so that license revocation was not, say, imposed for a DUI or similar offense.

In response, the Board states that it has conducted an “in-depth review of its overall enforcement program.” The Board states that it has “revis[ed] ... its disciplinary guidelines which resulted in a reduction of applicant cases filed requiring prosecution by” the Attorney General. On the other hand, it appears as though this review is not yet complete – or needs to be utterly re-done – for the Board in its report also says that the increase in complaints as a result of the Wildman bill has caused the Board to recognize “that it must again perform an in-depth review of its enforcement program and revise its disciplinary guidelines.”

Finally, as reflected in Issue #4 below, a review of the Board’s web site reveals that it is unclear how meaningfully the Board has in fact changed the way it disciplines RCPs for what the Committee and Department previously thought were relatively minor offenses, not warranting the ultimate Board sanction of license revocation.

NEW ISSUES. In September of this year, the Board submitted its report to the Committee. In the report, included in Members’ binders, the Board updates the Committee on all facets of its operations and significant, sunset-related actions taken since the last review. The new report and events intervening since the last review raise a series of new issues, which are discussed in detail below.

One other development not directly related to sunset review, but nevertheless noteworthy, is the departure of the Board’s long-time Executive Officer, Cathleen McCoy, who served in that capacity for eleven years. She has been replaced on an interim basis by Ms. Stephanie Nunez.

CURRENT SUNSET REVIEW ISSUES

BUDGETARY ISSUES

ISSUE #1: THE BOARD HAS PREVIOUSLY COMPLAINED ABOUT INADEQUATE FUNDING. IN RESPONSE, THE LEGISLATURE ENACTED SB 1980 (GREENE) IN 1998, A BILL THAT IN PART INCREASED RENEWAL FEES AND REQUIRED THAT THE BOARD MAINTAIN A SIX MONTH RESERVE.

Question #1 for the Board: *Expenses are expected to exceed revenues in FY 02/03. Why? More specifically, why hasn't the scheme enacted in SB 1980 prevented such budgetary fluctuations?*

Question #2 for the Board: *The Board projects not having anything close to a 6 month reserve for 03/04 and 04/05, including only a 1.1 month reserve for the latter. Are there any steps above increasing the renewal fee to the maximum \$230 that the Board should be doing to ensure its solvency?*

Question #3 for the Board: *Why is the Board projecting budgeting inflationary growth at 4% when there is essentially no inflation (in fact, recession) and a sharp drop in the number of applications?*

Question #4 for the Board: *The Board's projected revenues outpaced actual revenues in FYs 97/98 and 98/99. The Board's projected 97/98 revenues were \$1,802,060. Actual: \$1,727,630. Projected 98/99: \$2,059,512. Actual: \$1,889,056. Has the Board examined its assumptions behind these projections and changed them for its new projections?*

BACKGROUND: In response to the Board's significant, prior funding problems, in 1998 the Legislature passed and the Governor signed SB 1980 (Greene) which in part required the Board to set its renewal fee at a minimum of \$230 per year. (Business and Professions Code Section 3775(a) states in pertinent part: "renewal fee shall be established at two hundred thirty (\$230) dollars"). However, the statute also permits the Board to fix this fee so that the Board's reserve will be "equal to approximately six months of annual authorized expenditures," and, under the statute, the fee cannot be as high as \$230 if the reserve is expected to be greater than six months.

The Board's report says that implementation of the fee hike required by SB 1980 was postponed due to "fluctuations in Board budget and reserves." The Board also states that its cost-cutting measures – taken at the general direction of the Committee and the Department at the last review – were successful such that the fee increase was not imposed.

Nevertheless, the Board currently "anticipates" that this fee increase will be implemented in FY 02/03.

LICENSURE ISSUES

ISSUE #2: TOTAL APPLICATIONS TO SIT FOR THE RCP EXAM HAVE PLUMMETED – FROM 849 IN 98/99 TO 397 IN 00/01. THIS HAS BEEN A STEADY DECLINE OVER THE PAST THREE FISCAL YEARS. FEWER APPLICATIONS MEANS FEWER DOLLARS OF INCOME FOR THE BOARD. FEWER APPLICATIONS ALSO MEANS FEWER RCPs.

THE BOARD ARGUES THAT THIS REDUCTION IS TEMPORARY, STEMMING FROM A RECENT INCREASE IN THE EDUCATIONAL REQUIREMENTS FOR LICENSURE (ONE YEAR OF SCHOOLING DOUBLED TO TWO YEARS; AA DEGREE REQUIRED). THE LAWFULNESS OF THIS INCREASE IN

EDUCATIONAL PRE-REQUISITES IS UNCERTAIN, AT BEST. IT WAS ACCOMPLISHED SOLELY BY REGULATION; HENCE, THE LEGISLATURE AND THIS COMMITTEE HAD NO VOICE IN THE BOARD'S DECISION TO DOUBLE EDUCATIONAL REQUIREMENTS.

Question #5 for the Board: *The Board projects that \$351,000 will be coming in for 02/03 for application fees – a number that would be higher than the total number of application revenue received in BOTH FYs 99/00 and 00/01. What data and assumptions is this estimate based upon?*

Question #6 for the Board: *Is it still your position that the reduction of applications in FY 00/01 is due to the increase in educational requirements?*

Question #7 for the Board: *If so, then why is it temporary? Do you have data on current school enrollment that would bolster your projections that such a reduction is temporary?*

Question #8 for the Board: *The passage rate for exams is declining noticeably, by over 20% from 1999 to date. Why? Is this a good or bad development?*

Question #9 for the Board: *Is the Board concerned about its statutory authority to increase the educational requirement? What was the justification for making this change?*

Question #10 for the Board: *Is it the Board's view that an AA degree is required before someone can sit for the exam?*

BACKGROUND: The Board since the last review has drastically altered the educational requirements to sit for the RCP exam. Previously, one year of education was required. Now, the Board requires two years and the formality of an Associate Degree: “all applicants for licensure in California are required to meet minimum education standards, which have been increased to an Associate Degree.”

This doubling of the length of time a prospective RCP must stay in school and the additional, and potentially different, requirement of an AA degree, were accomplished solely by regulation (CCR 1399.330) and the Board's interpretation of that regulation. The Legislature did not expressly authorize these actions. Customarily, such significant changes in educational pre-requisites are accomplished legislatively, not quasi-legislatively, after input from and debate in this Committee and the Legislature broadly.

It is also not entirely clear that the Board has acted within the scope of its enabling statutory authority when it required two years of education and it is even less clear that the Board has the statutory grounding for requiring a degree.

The Board obtained a written legal opinion on these issues, but it was broadly framed and concluded inspecifically only that “section 3470 clearly authorizes the board to adopt educational criteria for respiratory care programs.” This is indisputably true as a general matter, but the opinion did not address the more specific issues: (1) whether the Board has the specific authority

to increase the requirements to two years; and (2) whether the Board has the authority to require a degree.

In the main, the opinion argues that the Board's authority to require a RCP to be a graduate of a school approved and reviewed by the Board also empowers the Board to require more substantive education. However, the Board is not currently approving schools individually and, in any case, it does not necessarily follow that the mandate to scrutinize and approve schools embraces the power to increase the education requirements. Perhaps the Board has the statutory authority to require a longer educational pre-requisite as a part of an ongoing school approval program, but it is harder to make that argument when such a program does not exist.

At best, this is a debatable conclusion, highlighting the wisdom of the custom that such changes be accomplished legislatively.

Less debatable is the legal authority to require a degree. The statute specifically states that an applicant to be a RCP need only "have successfully completed courses and training equivalent to the minimum standards established in this chapter for approval by the board." Observe that the statute speaks of "equivalence," a notion in precise opposition to the Board's requirement of an actual, non-equivalent AA degree. Similarly, and consistently, the regulation states that the educational requirement must be one "designed to culminate" in an AA degree. It does not require that the degree actually be awarded.

Nevertheless, the Board has required an AA degree, and does so now.

As well, it does not appear as though applicants were grandfathered into the new educational requirements. One applicant who completed the one-year of schooling but failed the exam was told she would have to obtain the AA degree before sitting for the exam again.

The Board has been considering changing educational requirements as early as 1996. The regulation increasing the requirement was promulgated in 1998 and effective July of 2000. It appears as though the Board had the time to seek a legislative change but instead chose a regulatory route. It also appears as though the Board was generally following the lead of the National Board for Respiratory Care, a private licensing and certification agency that provides exams, that is transitioning to an AA requirement.

Increased educational requirements translate into increased costs for students. Recall that RCPs attend vocational schools or community colleges and must often assume student loan obligations to pay for such schooling. For this reason, doubling the length of time in school at minimum will substantially increase student loan burden over the life of the student's loan. At most, such requirements will dissuade underprivileged students from pursuing a career as a RCP.

And finally, there have been well-publicized problems with some vocational schools. While there is no evidence before the Committee of any of these problem schools having respiratory school programs, recall that the Board does not review and approve individual schools and apparently did not before doubling the educational requirement.

This change in the educational setting takes place against a backdrop of substantially declining applications for examination. Total applications to sit for the exam have plummeted – from 722 in 97/98 to 397 in 00/01. This has been a steady decline over the past three FYs: 849 in 98/99, 614 in 99/00, 397 in 00/01. The Board depends upon fees for its solvency. In FY 99/00, for example, application/examination fees were about 14% of revenues.

The cause for such a decrease over the last few years could be due to a drag on applications (in prior FYs) as a result of higher-paying dot.com hiring; a decline due to prospective applicants being discouraged in the face of the increased length of schooling required; or a simple one-time reduction caused by the one extension of the educational pre-requisite for the exam.

ISSUE #3: THE BOARD HAS THE STATUTORY AUTHORITY – ARGUABLY, THE MANDATE – TO APPROVE SCHOOLS. IT HAS NOT.

Question #11 for the Board: *Why has the Board decided not to approve schools, especially given falling passage rates for exams?*

Question #12 for the Board: *Does it make sense to double the educational requirements without also approving schools to ensure that they are of a satisfactory quality?*

ENFORCEMENT ISSUES

ISSUE #4: MUCH OF THE DISCUSSION ABOUT THE BOARD AT THE LAST REVIEW CENTERED UPON THE BOARD’S AGGRESSIVE ENFORCEMENT POLICIES FOR WHAT SOME CALLED MINOR VIOLATIONS SUCH AS DUIs AND MINOR DRUG OFFENSES.

Question #13 for the Board: *How has the Board’s enforcement priorities changed since the last review? Has the Board formally changed its “proportionality” requirement?*

Question #14 for the Board: *The Board’s web-site lists FY 2000/01 disciplinary actions. Of the 60 listed, about 15 were for two or less DUIs, or possession of a controlled substance alone, or for failure to disclose such a conviction on a license renewal (likely motivated by prior policies of harsh discipline for such offenses). Are these actions reflective of the Board’s new enforcement policies?*

Question #15 for the Board: *Does the Board believe it is proportional to seek its most drastic remedy -- revocation -- of licenses for single instances of DUIs and/or possession of a controlled substance, or failure to disclose those convictions?*

Question #16 for the Board: *Has the Board communicated its new policies on enforcement to RCPs in a newsletter or in any other way?*

BACKGROUND: The Board has been criticized for spending too much of its resources prosecuting so-called “minor offenses;” especially those related to drug and alcohol abuse. The report states that: “Although the Board does discipline applicants and licensees for driving under the influence (since the last Sunset Review), providing to pursue discipline only if a person has 1 or more DUIs within three years or 2 or more DUIs within 5 years.”

This means, apparently, under the new guidelines, the Board will pursue a disciplinary case where 1 DUI is concerned.

The Board’s web-site lists FY 2000/01 disciplinary actions. Of the 60 listed, about 15 were for two or less DUI or possession of a controlled substance alone or failure to disclose the conviction on a license renewal (likely motivated by prior policies of discipline for such offenses).¹

ISSUE #5: THE ENFORCEMENT STATISTICS PROVIDED BY THE BOARD RAISE A NUMBER OF QUESTIONS REGARDING CHANGES AND VARIATIONS IN ENFORCEMENT ACTIVITIES.

Question #17 for the Board: *There was a large spike in the number of Statement of Issues filed in 99/00 – more than twice the next highest year. Why?*

Question #18 for the Board: *What was the reason the Board originally had DOI monitor mandatory probation in 96/97 then why did the Board take that function back in 98/99?*

Question #19 for the Board: *The report assumes an increase in the number of complaints over time. Why would this be so if educational requirements have improved, the number of applications is down, and minor violations are no longer going to be a basis for discipline?*

Question #20 for the Board: *Why has the number of days to process prosecutions to the pre-accusation phase increased from 33 days in 97/98 to 145 in 00/01?*

Question #21 for the Board: *The number of days for completion of a case post accusation has decreased over the same period, from 282 days to 156. Why?*

Question #22 for the Board: *How is it that if prosecution of minor violations are down, overall disciplinary proceedings – referred to in the report as “formal investigations” -- are up?*

Question #23 for the Board: *How did the AG reduce time for prosecutions but increase caseload? And why did the cost of formal investigations go down: 60,200 in 97/98, 43,600 in 00/01?*

¹ For example, John Curran, license revoked, convicted of DUI/nondisclosure, 2/5/01; Kerry Demouchet, license revoked, 2/8/01 DUI alone; Tibor Gyenes, license revoked, DUI no lo contendere, 2/25/01; Patrick Rodgers, license revoked, DUI alone; 2/25/01.

SCOPE OF PRACTICE ISSUE

ISSUE #6: IN THE AUGUST 10, 2001 BOARD MEETING MINUTES THERE IS A DISCUSSION ABOUT THE BOARD'S CONCERNS ABOUT HOME MEDICAL DEVICE PROVIDERS, PULMONARY FUNCTION TECHNICIANS, AND POLYSOMNOGRAPHY. THE DISCUSSION MENTIONS THAT SUCH PRACTITIONERS ARE UNLICENSED, HAVE NO QUALITY CONTROL, AND ARE UNQUALIFIED.

Question #24 for the Board: *Please explain the Board's viewpoint on this matter. What do these people do and why are they of concern to the Board? What does the Board recommend the Legislature do, if anything?*